CHAN

April 10, 2015

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Benny Lantigua**
Tax Registry No. 936911
Brooklyn Court Section
Disciplinary Case Nos. 2011-3533 & 2011-5135

In Case No. 2011-3533, the above named member of the service appeared before Deputy Commissioner Martin G. Karopkin on January 24, 2014. In Case No. 2011-5135, Respondent appeared before Assistant Deputy Commissioner David S. Weisel on July 11, August 26, and September 22, 2014, and was charged with the following:

DISCIPLINARY CASE NO. 2011-3533

1. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about November 19, 2010, having reported sick, wrongfully and without just cause was absent from his residence without permission of said Police Officer District Surgeon or the Medical Division Sick Desk supervisor.

P.G. 205-01, Page 2, Paragraph 4 — **REPORTING SICK**
PERSONNEL MATTERS

DISCIPLINARY CASE NO. 2011-5135

1. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer intentionally placed or attempted to place another person, an employee of said restaurant, in reasonable fear of physical injury, serious physical injury, or death by displaying a deadly weapon, dangerous instrument, or what appeared to be a pistol or other firearm, by calling to said other person and pointing his off-duty firearm at said person.

P.G. 203-10, Page 1, Paragraph 5 — **PUBLIC CONTACT – PROHIBITED CONDUCT**
GENERAL REGULATIONS

PENAL LAW 120 14 (1) — **MENACING IN THE SECOND DEGREE**

2. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer operated a motor vehicle while his ability to do so was impaired by the consumption of alcohol.

P.G. 203-10, Page 1, Paragraph 5 — **PUBLIC CONTACT – PROHIBITED CONDUCT GENERAL REGULATIONS**

V.T.L. 1192 (1) — **OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS**

3. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer operated a motor vehicle while in an intoxicated condition.

P.G. 203-10, Page 1, Paragraph 5 — **PUBLIC CONTACT – PROHIBITED CONDUCT GENERAL REGULATIONS**

V.T.L. 1192 (3) — **OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS**

4. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0655 hours, while off-duty, in or about the 28th Precinct stationhouse, New York County, having been arrested for driving a motor vehicle while under the influence of alcohol, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer refused to submit to a field sobriety test and a test to determine his blood alcohol level.

P.G. 203-10, Page 1, Paragraph 5 — **PUBLIC CONTACT – PROHIBITED CONDUCT GENERAL REGULATIONS**

5. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, was unfit for duty due to the consumption of alcohol.

P.G. 203-04, Page 1, Paragraph 2 — **FITNESS FOR DUTY GENERAL REGULATIONS**

6. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, was armed while unfit for duty due to the consumption of alcohol.

P.G. 203-04, Page 1, Additional Data — **FITNESS FOR DUTY**
GENERAL REGULATIONS

7. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, wrongfully did fail and neglect to safeguard his off-duty firearm, a 9mm Glock model 26, semi-automatic pistol, in that said Police Officer left said firearm inside a holster inside wrapped in a shirt under the driver's seat of his parked private vehicle.

P.G. 204-08, Page 2, Paragraphs 7 & 8 — **FIREARMS – GENERAL REGULATIONS**
UNIFORMS AND EQUIPMENT

8. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer wrongfully possessed an unauthorized copy of a NYPD Restricted Parking Plate in said Police Officer's private vehicle.

P.G. 203-10, Page 1, Paragraph 5 — **PUBLIC CONTACT – PROHIBITED CONDUCT**
GENERAL REGULATIONS

P.G. 203-06, Page 2, Paragraph 16 — **PERFORMANCE ON DUTY – PROHIBITED CONDUCT**
GENERAL REGULATIONS

9. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, wrongfully operated his personal vehicle without possessing a valid New York State driver's license.

P.G. 203-03, Page 1, Paragraph 5 & Note — **COMPLIANCE WITH ORDERS**
GENERAL REGULATIONS

V.T.L. 509 (1) — **VIOLATIONS**

10. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, wrongfully had failed and neglected to inform his commanding officer, with pertinent details, that his New York State driver's license had expired on May 18, 2011.

P.G. 203-03, Page 1, Paragraph 5 **COMPLIANCE WITH ORDERS GENERAL REGULATIONS**

11. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, at about 0600 hours, while off-duty, outside El Viejo Jobo restaurant, located at 231 Sherman Avenue, New York County, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer impeded an official Department investigation by repeatedly denying to 34th Precinct Patrol Supervisor Sergeant Jesse Turner that said Police Officer was in possession of his firearm when, in fact, said Police Officer's firearm was secreted under the driver's seat of his private vehicle parked at said location.

P.G. 203-10, Page 1, Paragraph 5 **PUBLIC CONTACT – PROHIBITED CONDUCT GENERAL REGULATIONS**

12. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about June 25, 2011, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer impeded an official Department investigation by failing to disclose to Department investigators the identities of two (2) men who had been inside said Police Officer's private vehicle when said Police Officer reportedly menaced another person with a firearm, and had returned to said other person's place of employment and inquired about his work schedule from his co-workers.

P.G. 203-10, Page 1, Paragraph 5 **PUBLIC CONTACT – PROHIBITED CONDUCT GENERAL REGULATIONS**

In a Memorandum dated February 27, 2015, Assistant Deputy Commissioner David S. Weisel found the Respondent Guilty of Specification Nos. 5, 6 and 12, and Not Guilty of Specification Nos. 1, 3 and 11 in Disciplinary Case No. 2011-5135. Having pleaded Guilty to Disciplinary Case No. 2011-3533, and to Specification Nos. 2, 4 and 7-10 in Disciplinary Case No. 2011-5135 Assistant Deputy Commissioner David S. Weisel found the Respondent Guilty. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

The Respondent's combined acts of misconduct are egregious and warrant separation from the Department. However, instead of an outright dismissal from the Department, I will permit an alternative manner of separation from the Department for the Respondent at this time.

It is therefore directed that an ***immediate*** post-trial negotiated agreement be implemented with the Respondent, in which he shall immediately file for vested-interest retirement, forfeit thirty (30) suspension days (previously served), thirty (30) vacation days, that he be placed on One-Year Dismissal Probation, forfeit all time previously served while on suspension, with and without pay, if any, waive all time and leave balances, including terminal leave, if any, and retire from the Department while on Modified Assignment.

Such vested-interest retirement shall also include the Respondent's written agreement to not initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If the Respondent does not agree to the terms of this vested-interest retirement agreement as noted, this Office is to be notified without delay. This agreement is to be implemented ***IMMEDIATELY.***

William J. Bratton
Police Commissioner

The City of New York

POLICE DEPARTMENT

February 27, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Benny Lantigua
Tax Registry No. 936911
Brooklyn Court Section
Disciplinary Case Nos. 2011-3533 & 2011-5135

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Respondent was charged with the following:

Disciplinary Case No. 2011-3533

1. Said Police Officer Benny Lantigua, while assigned to the 24th Precinct, on or about November 19, 2010, having reported sick, wrongfully and without just cause was absent from his residence without permission of said Police Officer District Surgeon or the Medical Division Sick Desk supervisor.

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P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by David H. Green, Esq. Department Advocate's Office. Respondent was represented by John P. Tynan, Esq., Worth, Longworth & London LLP.

Respondent pleaded Not Guilty to Specification Nos. 1, 3, 5, 6, 11 and 12 in Case No. 2011-5135. He pleaded Guilty to Case No. 2011-3533, and to Specification Nos. 2, 4 and 7-10 in Case No. 2011-5135, and testified in mitigation of the penalty. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

In Case No. 2011-5135, Respondent is found Guilty of Specification Nos. 5, 6 and 12, and Not Guilty of Specification Nos. 1, 3 and 11. Having pleaded Guilty to Case No. 2011-3533, and to Specification Nos. 2, 4 and 7-10 in Case No. 2011-5135, he is found Guilty.

FINDINGS AND ANALYSIS

Case No. 2011-3533

In the first case, Respondent is charged with being out of residence while sick. He was on sick report on November 19, 2010. Respondent was injured and had been on sick for a little over a month at that time. He left his residence around 2300 hours on Thursday, November 18, 2010, to visit his [redacted] at her home. He did not call the sick desk to ask permission because he thought that his regular day off had commenced. In fact, it actually commenced the next day. Respondent testified that he simply misunderstood his calendar.

An investigator from the Absence Control & Investigations Unit visited Respondent's residence while he was not there. Respondent testified that he returned home after receiving a call from his supervisor that ACIU was looking for him. Once he got home, the ACIU investigator found him.

As Respondent has pleaded Guilty, he is found Guilty.

Case No. 2011-5135

On Friday, June 24, 2011, Respondent got off work around 2335 hours from his assignment at the 24 Precinct. He went out with his friends to several bars or clubs in Northern Manhattan, [redacted]. He was drinking but drove his personal vehicle on the outing. Around 0700 hours the next day, the group of about five people arrived at El Viejo Jobo, a

restaurant located within the confines of the 34 Precinct at West 207th Street and Sherman Avenue. There was a worker named Person A sweeping the sidewalk.

According to the Department, Respondent, while pointing his gun at Person A, told the worker, "Está aquí Mexico," or "Hasta aquí Mexico." The exact meaning of this was uncertain and stated differently among different witnesses. It could have meant something along the lines of, "Get over here, Mexican," or, "That's it, Mexican," or literally, "Mexico is here." Person A walked away but Respondent and the other members of his group went into the restaurant. Person A told another employee and called 911.

Surveillance video (DX 9) showed a white SUV pulling up to Person A as he was sweeping right at the curb at approximately 0654. Person A appeared to speak to the occupants, possibly in response to them saying something. He made a gesture that seemed to indicate he did not appreciate what was going on. He walked away but returned to the car, and kept working the whole time.

Officers from the 34 Precinct responded to this call of a male with a firearm. Police Officer (now Sergeant) Wilson Lema was one of the first to arrive. He saw the [redacted] vehicle described over the radio. A female manager gave Lema some details, that a person inside the restaurant wearing a white T-shirt had pointed a gun at one of the employees. When the manager stated that she believed the suspect to be a police officer, Lema notified the patrol supervisor, Sergeant (now Lieutenant) Jesse Turner.

Lema spoke to Person A, who told him that a male in a white vehicle pointed a gun at him "to his face" while it was still in the holster. Person A pointed out Respondent as the suspect. Lema informed Turner of these developments.

Turner testified that Lema told him that Person A said the firearm was located underneath the driver's seat of the car. Lema pointed out Respondent, who was eating at a table, to Turner.

Turner informed his lieutenant, who stated that everyone involved should be brought to the station house for further investigation.

According to Turner, Respondent began exiting El Viejo Jobo and displayed his shield. Respondent told him to hold on and asked him if he had a firearm. Respondent said no. Turner specified if Respondent had a gun "on him" or if he had one in the vehicle. Again Respondent denied it.

Turner testified that he asked Respondent "if I could get his keys" to the vehicle. Respondent handed them over. With Respondent following him, Turner entered the car and found a firearm under the driver's seat, in a holster, wrapped in a shirt. When Turner confronted Respondent about this, he said, "[W]ell, you didn't ask me if it was inside the car."

Turner described Respondent as having his shirt "disheveled" or pulled out. There were stains all over it. As well, Respondent had "a faint odor of alcohol emanating." Respondent had watery eyes and "[k]ind of had an unsteady sway to his step." Turner believed him to be intoxicated, as well as unfit for duty (see Department Exhibit 2, Turner's Fitness for Duty Report [FFD]).

After the investigative units completed their investigation, around 1100 hours, Turner placed Respondent under arrest. He was charged with, inter alia, driving while intoxicated.

Deputy Inspector Miriam Lorenzo was the duty captain on the morning of the incident. She arrived at the 34 Precinct station house sometime before 0915 hours, the time listed on her FFD (DX 5). Lorenzo conceded that she took Turner's FFD into consideration, although she insisted she performed an independent evaluation. Lorenzo marked that there was no odor of alcohol on Respondent. She agreed with Turner that Respondent's clothes were disheveled and his eyes were watery or glassy. Lorenzo added on the form that Respondent's eyes were

bloodshot. He was cooperative and spoke normally. Lorenzo concluded that Respondent was unfit for duty.

Lorenzo also conducted the more formal recorded interview of Person A (see DX 6, transcript), who did not testify at trial. No reason for his non-appearance was given. Lorenzo conducted the interview in Spanish, a language in which she was conversant but not proficient enough to, for example, be a certified court interpreter. The interview itself was translated after the fact by a service.

Person A stated that he "saw his hand like this with a gun. I saw the barrel of the gun." The individual "had the gun in my face, I mean, putting it in my face –." Person A was frightened but decided to keep working. In fact, he paid him no mind. Person A observed the individual put the gun away, near the steering wheel. The individual was sitting next to a woman.

Police Officer Edward O'Connell was the Patrolmen's Benevolent Association (PBA) delegate at the 34 Precinct. When O'Connell arrived at the station house on June 25, 2011, sometime after 0700 hours, someone at the desk told him that there had been an off-duty incident involving Respondent.

O'Connell testified that shortly after he arrived, members of the investigative units present at the command asked him to find out from Respondent who else had been in the car with him. O'Connell relayed to Respondent that the investigators wanted to know this information, but Respondent refused to say. O'Connell found Respondent's appearance to be normal and did not smell alcohol. Later, O'Connell found out that the investigators already knew other people had been in the vehicle. They wanted to inquire further because "[a]pparently somebody had gone back to the restaurant . . . to find out the hours of an individual that worked there."

Respondent was taken to the Intoxicated Driver Testing Unit (IDTU) for examination. At 1103 hours, he was recorded on video as the examining officer, Police Officer John King, began the process. Respondent refused to take the either the breathalyzer or coordination tests even after King warned him that refusal to take the breath test would result in the immediate suspension and revocation of his driver license or driving privileges. Respondent appeared to be well balanced and spoke without slurring. His eyes appeared somewhat watery, however (see DX 4, IDTU examining paperwork; DX 3, video [file name vts_01_1.vob]).

Respondent testified at trial and stated in his official Department interview (DX 7, transcript) that he worked the third platoon on June 24, 2011. After his tour, first he hung out with his friends on the street. Then, around 0200 hours on June 25, 2011, Respondent got a call that his "girlfriends" were at Papasito, a restaurant in Northern Manhattan. He drove there, and indicated that he was there with two men and two women. He left his weapon in his vehicle when he entered Papasito. He thought he would not be staying long and knew that he would not be allowed inside with his weapon. They nevertheless stayed at Papasito for an hour and a half to two hours. Respondent consumed two to three lowball glasses of Hennessy cognac on the rocks while there. He also conceded that he was prescribed [redacted] for his [redacted] but did not recall if he took it that day. After last call, Respondent and his friends again hung out on the street until around 0600 hours. Respondent denied that he was intoxicated and insisted that he "was good" when he got behind the wheel.

Respondent testified that his group then arrived at El Viejo Jobo anywhere from 0500 to 0600 hours. There might have been a total of six people in the car. Respondent indicated that he was driving. Respondent stated that his driver's license had expired on his birthday that year, May 18th. He either did not realize it was expiring or forgot to renew it. Respondent also admitted that his Department parking plaque had been confiscated after someone took a

photograph of him parking illegally near a friend's house. Respondent photocopied the original and kept it in his car. He made some alterations to it to fit his current vehicle and laminated it.

The windows were down when Respondent's party arrived at El Viejo Jobo. The other two men and one woman exited the car. The remaining woman was "Person B" someone Respondent previously "dated" but did not consider a girlfriend and whose last name he did not know. Respondent removed his firearm, which was located in a holster, from his waistband and placed it underneath his seat. He did not want the weapon to be seen inside the restaurant. He rolled the windows back up and the two began kissing. Respondent admitted seeing a worker on the sidewalk but denied saying anything to him. Respondent and the woman then entered El Viejo Jobo.

Respondent testified that he exited the restaurant when he saw four RMPs outside. He wanted to know what was going on. He also knew some of the officers, he claimed, because [redacted]. Several of the Department's witnesses, however, even the PBA delegate, stated that they knew Respondent from prior run-ins with the 34 Precinct. In his testimony on the prior case involving his absence from residence while sick, Respondent indicated that he had been on modified duty status after an incident with his family that did not result in charges and specifications.

Respondent spoke to a sergeant that asked him "if I had my weapon on me." Respondent answered no. "Then he asked me for my keys, and he went to my car." The sergeant retrieved his weapon and said that Respondent had to return to the precinct.

Once at the 34 Precinct station house, Respondent immediately contacted his own delegate from the 24 Precinct. The delegate told Respondent that he learned he was getting arrested and not to say anything. Respondent stated at his official interview that he told

investigators who else was in his vehicle. At trial, however, he admitted that he did not answer a female inspector when she asked him who else was in the vehicle.

Respondent contended that his delegate also advised him to refuse to take the breathalyzer and coordination tests. The delegate let Respondent know that his license would be suspended. When asked on cross examination if he was still under the influence of alcohol at the time he spoke to his delegate, Respondent answered, "This happened on yes, I had drinks the night before. Yes, I had drinks from the night before." Upon subsequent questioning by the Court, however, Respondent denied that he still was feeling the effects of the alcohol when he refused to take the tests. Respondent testified that he was on restricted duty on the date in question due to the prior ankle injury and surgery dating back to November 2010. This caused him to limp.

Respondent was indicted with respect to these charges. On December 13, 2011, Respondent pleaded guilty in Supreme Court, New York County (Thomas Farber, J.), to the violation of harassment in the second degree (Penal Law § 240.26) and the traffic infraction of driving while ability impaired (DWAI). He was sentenced to a conditional discharge, 10 days of community service, a drinking and driving education program, and a $300 fine. Respondent's driver's license also was suspended for 90 days, although the Court stayed the suspension for 20 days. Respondent allocuted to the DWAI and stated that he "harassed a worker at a restaurant uptown." The prosecutor stated, when asked by the Court, that based on the agreement with defense counsel, the People would not require Respondent "to allocute as to what he did" specifically to the worker (see DX 8, plea transcript). Respondent indicated at his official interview that he only pleaded guilty because Person A could have seen his weapon as he removed it from his waistband.

Specification Nos. 7-10

Respondent pleaded Guilty to failing to safeguard his weapon by leaving it under the driver's seat of his car (Specification No. 7), having a photocopy of his parking plaque (Specification No. 8), driving without a valid license (Specification No. 9), and failing to inform his commanding officer that his license had expired (Specification No. 10). As such, he is found Guilty.

Specification No. 1

The first specification charges that Respondent committed the crime of menacing in the second degree in that he intentionally placed or attempted to place Person A in reasonable fear of physical injury, serious physical injury, or death by displaying a deadly weapon, dangerous instrument, or what appeared to be a pistol or other firearm, "by calling to" Person A and "pointing his off-duty firearm at" Person A.

As noted supra, the Department contended that Person A asserted to responding police officers that Respondent pointed the weapon at him while uttering an offensive remark toward Mexicans. Person A did not testify at trial. Thus, the most direct evidence of the charge was Person A's formal interview statement to Lorenzo. Person A stated that the individual "had the gun in my face, I mean, putting it in my face –." Person A did not see from where he got the gun; when Person A saw it, it already was in the man's hand. The man looked at Person A and was "like this, like this with this hand." He did not say anything and considered whether to call the police, but decided to keep working because he had a job to do. Thus Person A "paid him no mind. I didn't move. I didn't pay attention to him." His "[r]eally calm, really serene" demeanor, however, was "just for show" because in fact he was frightened. According to Person A, a

customer from inside the restaurant saw what happened and called the police Person A did not tell anyone.

Although hearsay is admissible in this forum, see Matter of Ayala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. The hearsay is central to the Department's case, so there is a question of basic fairness in using the hearsay to reach a finding of fact. See *Case No. 77005/01*, p. 6 (May 27, 2002) (hearsay declarations are insufficient to support findings of guilt in cases that pose close questions of credibility). Here, the defense was unable to ask questions about Person A's credibility and accuracy, such as how far away the gun was, the lighting conditions inside the car, and so forth.

Moreover, Person A never said explicitly in the interview that the gun was pointed at him. This is an element of the specification that the Department is required to prove. At trial, Person A would have been subjected to cross examination or even just clarifying questions to determine whether Respondent pointed the gun at him or if he meant something else by "putting it in my face." It could not be literally true that Respondent put it in his face because Person A stated that Respondent was driving the car, and Person A can be seen on the video outside the passenger seat. This especially is true because Person A gave his interview statement in Spanish and something could have been lost in translation.

All the more reason, then, that the tribunal cannot rely on Person A's statement alone. Any other statements by Department witnesses, like Lema, the first officer on the scene, that Person A said Respondent pointed the gun at him, are based on multiple layers of hearsay and thus are even more problematic.

The Department argued on summation that Respondent's motive in pointing the weapon at Person A was to act tough and impress Person B. That would be a good motive, but it does not prove the charge.

It is true, as the Department argued, that Person A had no known reason to fabricate this kind of claim against Respondent. The two did not know each other. Respondent contended, however, that Person A could have made a mistake and that the entire event was a misunderstanding. He suggested that Person A did see his gun while he removed it from his waistband and put it under his seat.

The video supports Respondent's account. Victims of crime do not have to act in a "certain way" after an assault to be believed. To imply otherwise would do a great disservice to all complainants. But for someone with a gun supposedly pointed in his face, a scary moment to be sure, Person A did not run. He did not step back out of the way. Instead, he looked angry, perhaps at an ethnically offensive statement like "hasta aquí Mexico." Cross examination, at the very least, would have allowed the defense to explore why Person A did not flee in fear from a gun pointed at his face, and instead not only kept working but right next to the car in which Respondent still was seated.

The Court has viewed the surveillance video countless times. It can see nothing recognizable pointed out of the passenger side window, much less a gun. The interviewers did not ask Person A to describe, for the record, what he meant when he said Respondent held the gun "like this."

Finally, Respondent pleaded guilty in the criminal proceeding to harassment. He thus admitted, and is collaterally estopped from contesting, that he harassed Person A. See Meades v.Spinnato, 138 A.D.2d 579, 580 (2d Dept. 1988); *Case No. 74713/99*, p. 24 (Mar. 23, 2002). The Advocate stated that Respondent was convicted specifically of Penal Law § 240.26 (1).

That proscribes when, with intent to harass, annoy or alarm another person, the actor strikes, shoves, kicks or otherwise subjects the other to physical contact, or threatens to or attempts to do so. The Court cannot exclude the legal possibility that Respondent harassed Person A by displaying the gun without pointing it at him. In fact, the criminal plea appears to have been structured so as to let Respondent avoid admitting specifically how he harassed Person A. This was at the agreement of Supreme Court, the People and defense counsel.

In sum, the Department failed to prove that Respondent pointed the weapon at Person A. Without the opportunity to explore Person A's claims in person at trial, the possibility remains, even taking the complainant's interview at face value, that Respondent displayed the weapon and called him a Mexican, but did not point the gun at him. As such, Respondent is found Not Guilty.

Specification Nos. 2-6

Respondent pleaded Guilty to driving while his ability was impaired by alcohol (Specification No. 2). This is a traffic infraction under the Vehicle and Traffic Law. He pleaded Not Guilty, however, to Specification No. 3, which charged him with driving while intoxicated (DWI). This is a criminal misdemeanor under the VTL. DWI can be proved "per se" by taking the defendant's blood alcohol content at or over 0.08 fulfills the requirement. See VTL § 1192 (2). It also can be proved at "common law," meaning that the defendant's behavior and performance of field sobriety tests can be examined. See VTL § 1192 (3); People v. Blair, 98 N.Y.2d 722, 724 (2002).

DWI requires a showing that the defendant was incapable of employing the physical and mental abilities he was expected to possess in order to operate a vehicle as a responsible and prudent driver. DWAI, however, requires only that such ability be impaired to any extent by the

voluntary consumption of alcohol. See People v. Cruz, 48 N.Y.2d 419, 426-28 (1979). Speaking generally, a defendant can be charged with DWAI if his BAC is above 0.05 but less than 0.08. See VTL §§ 1195 (2)(b),(c). In practice, and quite possibly in Respondent's case, DWAI can be offered as a plea in DUI cases where the BAC is not known. Here, of course, Respondent refused the breathalyzer and coordination tests (pleading Guilty to Specification No. 4) so his BAC was not known.

The evidence here was insufficient to prove intoxication. Although Turner, the patrol supervisor, claimed that Respondent was unsteady on his feet, the video evidence from both the sidewalk outside El Viejo Jobo and the IDTU examination did not support that assertion. Respondent's only relevant movement was to shift from one foot to the other, once, during the IDTU process, while handcuffed. His clothes did not appear disheveled. His eyes did appear watery. That, however, in the context of a stressful, sleepless night, is not much proof of intoxicated driving. A faint scent of alcohol is consistent with drinking, but those two circumstances are insufficient for the tribunal to conclude that Respondent was legally incapable of exercising the ability to drive reasonably and prudently.

Respondent's refusal to take the breathalyzer test, after being duly warned, constitutes evidence against him in that it can show consciousness of guilt. See VTL § 1194 (2)(f); People v. Smith, 18 N.Y.3d 544, 550 (2012). Generally, the probative value of consciousness evidence is weak, as there may be an innocent explanation, and thus is highly dependent upon the facts of the given case. See People v. Cintron, 95 N.Y.2d 329, 333 (2000); People v. Yazum, 13 N.Y.2d 302, 304 (1963). Here, Respondent testified that his delegate advised him to refuse. The delegate could have felt, not knowing Respondent's actual BAC, that it was wiser to take the State and Department penalty for a refusal than to gamble on the results of the test. Although

Respondent ultimately is responsible for his own legal decisions, it is an explanation for his conduct that is not necessarily consistent with intoxication.

Therefore Respondent is found Not Guilty of driving while intoxicated, Specification No. 3.

It is not disputed that Respondent's ability to drive was impaired by alcohol. He admitted it in his Supreme Court plea and is estopped from contesting it now. If Respondent's ability to drive was impaired by the voluntary use of alcohol, it follows that he was unfit for duty. Cf. *74713*, p. 26 ("[I]t invariably follows that if the Respondent was found guilty beyond a reasonable doubt of driving while intoxicated, he was also unfit for duty."). Thus Respondent is found Guilty of Specification No. 5, being unfit for duty. As it was undisputed that Respondent was armed at the time, he is found Guilty of Specification No. 6 as well.

Specification No. 11 charges Respondent with impeding the official Department investigation into the incident. Turner testified that he asked Respondent several times if he had his firearm. Turner stated that he asked Respondent if he had it on his person or if it was in his car. Both times Respondent allegedly said no. Respondent, however, testified that Turner only asked if he had his gun "on him." Because that was literally not true, he answered no.

Either way, there is insufficient proof that Respondent impeded the investigation by his answers. In order to prove impeding an investigation, the Department must show how the Respondent caused investigators to take steps they otherwise would not have taken. See *Case Nos. 2010-0218 & -0272*, pp. 40-41 (Mar. 26, 2012); *Case No. 84828/09*, p. 22 (Jan. 11, 2011). It is not enough to show, here, that Respondent's statement was true, false, or somewhere in between depending on one's perspective.

At the time he spoke with Respondent, Turner already knew that Person A told one of the first officers to arrive that Respondent had secreted the weapon under the driver's seat of his car.

If Respondent had admitted to Turner that the gun was under the seat, the sergeant would have searched for it there. Respondent denied it, and Turner still searched for the gun underneath the seat. In other words, no matter what Respondent told Turner, Turner would have taken the same action of entering the car and securing the firearm. Respondent's allegedly false answer did not impede him in any way from doing that. Therefore Respondent is found Not Guilty.

The final specification charges that Respondent impeded the investigation by failing to disclose to Department investigators the identities of two men who had been inside his vehicle. O'Connell, the PBA delegate for the precinct to which Respondent was taken after the incident, testified that investigators asked him to find out from Respondent who else had been in the car with him. The reason was that the investigators had been informed that someone had gone back to the restaurant to find out the hours of one of the workers. The inference was that someone operating on Respondent's behalf was trying to contact at best, or intimidate at worst, a witness, possibly the complainant himself. According to O'Connell, Respondent refused to tell him this information. Respondent indicated that he refused to tell the *duty captain* this information.

Respondent argued that the investigators were trying to do an improper end-run around Patrol Guide § 206-13 (1). The procedure provides that when a member of the service is the subject or witness in an investigation of a serious violation, investigators must allow the member to obtain counsel before commencing questioning.

Here, however, as the Advocate correctly pointed out, the investigators were investigating the possibility of an ongoing and emerging crime by Respondent's associates against Person A. This could only have been undertaken by those individuals acting on their own because Respondent was detained at the station house at the time. Thus, the investigators were not trying to ask questions of Respondent as a subject of the investigation or as a witness to a disciplinary violation by another member of the Department. Moreover, any answer could not

have incriminated him within the meaning of the Fifth Amendment. Nor was he entitled to rely on bad advice from his own delegate. Thus, Respondent is found Guilty of impeding this part of the investigation.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on January 10, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department sought termination as a penalty, but the Court has found Respondent Not Guilty of the most serious specification. He nevertheless has been found Guilty of several serious infractions and thus a period of monitoring is necessary. Therefore, the Court recommends that Respondent be *DISMISSED* from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Administrative Code § 14-115 (d), during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. The Court further recommends that Respondent forfeit the 30 days he served on suspension without pay and that he forfeit an additional 25 vacation days. See *Case No. 2013-9381* (Sept. 12, 2014) (negotiated penalty of ordered breath testing, one-year dismissal probation, 55 pre-trial suspension days for operating a vehicle while under the influence and while ability impaired by intoxicant, unfit for duty, failing to safeguard service firearm and Department ID card, leaving scene of an accident, and providing evasive answers when questioned about overturned vehicle).

DISAPPROVED
APR 10 2015
POLICE COMMISSIONER

Respectfully submitted,
David S. Weisel
Assistant Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER BENNY LANTIGUA
TAX REGISTRY NO. 936911
DISCIPLINARY CASE NOS. 2011-3533 & 2011-5135

In 2012 and 2014, Respondent received an overall rating of 3.0 "Competent" on his annual performance evaluation. He was rated 3.5 "Highly Competent/Competent" in 2013. He has been awarded one medal for Excellent Police Duty. [redacted] He has no prior formal disciplinary record. He has been on modified duty status since July 2011.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner – Trials